tional Airport and adjacent areas into the District of Columbia sewage treatment and disposal facilities (JA 2, 6). To construct it, respondent divided the proposed Potomac Interceptor Sewer into approximately ten lineal segments or units and entered into a separate contract for the construction of each of these units (JA 2, 6). The contract respondent entered into with petitioner, No. D.C.F.-C18959[2], provided for the construction of one of these units, identified as Unit 3, and lying between Angler's Inn and Great Falls, Maryland (JA 2, 6).

Petitioner's contract and various change orders issued pursuant thereto called for petitioner's completion of Unit 3 by February 27, 1963 (JA 3, 6). The contract contained a provision requiring petitioner to pay respondent the sum of $250, denominated "liquidated damages," for each calendar day of delay in completion of the contract, "subject to the provisions of Article 9 of the Contract Form, Form No. 23" (JA 2, 6, 11). Article 9 provided for payment of liquidated damages in lieu of actual damages (JA 2, 6, 11-12). Petitioner did not complete performance of the contract until July 16, 1963 (JA 3, 6) and respondent withheld from the sums due petitioner under the contract the sum of $34,750, as "Liquidated Damages 139 Cal. Days [from February 27 to July 16, 1963] at $250 per day" (JA 3, 6). To recover this sum, petitioner brought this action in the United States District Court for the District of Columbia, invoking that court's jurisdiction under D.C. Code, § 11-521 (JA 1).

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[2] This is a standard United States Government form of construction contract, slightly modified for use by respondent District of Columbia.

In its complaint petitioner alleged (JA 3) and respondent in its answer admitted (JA 6-7) that the nature of the Potomac Interceptor Sewer and its plan were such that no unit of the Sewer could function as a sewer until all units downstream from the unit in question were first completed, connected, and able to function; that lying downstream from petitioner's Unit 3 are at least two other units of the Potomac Interceptor Sewer; that the contracts for the construction of such other units were not awarded by respondent until after petitioner's contract for the construction of Unit 3 was awarded; and that construction of such other units was not in fact completed until after July 16, 1963, the date petitioner completed construction of Unit 3.

Petitioner further alleged that the completion of Potomac Interceptor Sewer units downstream from Unit 3 was not scheduled until some time after completion of Unit 3; that, by reason of the fact that such downstream units were not in fact completed until after Unit 3 was actually completed, respondent had not been damaged by the delay in the completion of Unit 3; and that, in view of the foregoing, respondent's withholding of $34,750 from the contract price due petitioner constituted the imposition of a penalty by respondent on petitioner and a breach of contract by respondent (JA 2-4). Although these allegations were denied by respondent in its answer (JA 6-7), on oral argument in the district court (JA 25), and again in the Court of Appeals, counsel for respondent conceded, for the purposes of respondent's motion for summary judgment and petitioner's appeal from the order granting said motion, that the sum withheld by respondent did constitute a penalty.

In its answer to the complaint respondent asserted as a defense that petitioner had "failed to exhaust his administrative remedies provided for in the alleged contract" (JA 5-6). On this same ground, respondent filed its motion to dismiss the complaint or, in the alternative, for summary judgment (JA 9). On August 5, 1965, the district court entered an order granting respondent's motion for summary judgment (JA 26), from which order and judgment petitioner appealed (JA 26).

In the lower courts it was respondent's position, in brief, that petitioner had been late in completing contract performance; that petitioner had requested an extension of time from the contracting officer to complete the contract; that the contracting officer had granted petitioner a 35-day extension of time, leaving petitioner 139 days late in completion; that petitioner had failed to appeal from this decision of the contracting officer to the District of Columbia Contract Appeals Board; and that petitioner had not therefore exhausted its administrative remedies, and was thereby barred from bringing this action to recover the admittedly penal (JA 25) "liquidated damages" assessed against it.

Petitioner argued in the court below that there were no administrative remedies available to petitioner that required exhaustion—first, because Article 15 of the contract (*supra*, p. 3; JA 12) required appeal only of disputes "arising under" the contract, and second, because Article 15 committed to agency determination only those disputes as to which the Contract Appeals Board could make "final and conclusive" decisions. Petitioner challenged the legality and enforceability of the "liquidated damages" penalty provision of the

contract, and showed that this was not a question "arising under" the contract and was, indeed, a question of law not committed by the contract to administrative decision and one that could not have been so committed by reason of section 2 of the Wunderlich Act, *supra,* p. 2).

The court below nevertheless held, without opinion, that petitioner had failed to exhaust its administrative remedies and on this ground affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

In deciding the case, the courts below fell into error, an error that can not withstand analysis and, indeed, an error that brought the decision below into direct conflict with decisions of this Court and of the Court of Claims dealing with the same provisions of the standard form of government construction contract.

1. It is well settled in government contract cases (see *infra,* p. 12) that where the contract does not give the contracting agency authority to decide a question, there is no need for the contractor to appeal from the contracting officer's decision to the agency's contract appeals board as a prerequisite to bringing his action in court.

This is precisely what is involved in the instant case, and what the court below held the contractor must do.

"[T]he coverage of the disputes clause [Article 15] is a matter susceptible of contractual determination, *United States* v. *Moorman,* 338 U.S. 457 * * *." *United States* v. *Utah Construction,* No. 440, October Term, 1965, decided June 6, 1966, slip op., p. 17. By Article 15 of their contract (*supra,* p. 3; JA 12), petitioner

and respondent clearly agreed that the only disputes between them that are subject to appeal to respondent's Contract Appeals Board are those (1) "arising under" the contract and (2) where that Board has the power to make a "final and conclusive" decision. That is what the language of Article 15 says.

There is only one true issue in this action: Were the "liquidated damages," assessed against petitioner for concededly late completion of its segment of the Potomac Interceptor Sewer, true liquidated damages or, rather, an unenforceable penalty?[3] This is neither a question "arising under" the contract, nor one as to which the Contract Appeals Board could have made a final or conclusive decision.

"[T]he settled construction of the disputes clause excludes breach of contract claims from its coverage * * *." *United States* v. *Utah Construction, supra,* slip op., p. 17. Such claims may *relate to* the contract

[3] That the $34,750 withheld by respondent from petitioner's contract price was in truth a penalty is clear and was conceded below by respondent (JA 25). The allegations of the complaint (JA 3), admitted by respondent (JA 6-7), are that Unit 3 of the Potomac Interceptor Sewer built by petitioner was completely unusable as a sewer until at least two other downstream units of the Interceptor were completed; that contracts for the construction of such downstream units were not awarded by respondent until after petitioner's contract was awarded; and that the downstream units were not in fact completed until after petitioner actually completed Unit 3. "Liquidated damages" in these circumstances were obviously not liquidated damages at all but could "serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements." *Priebe & Sons* v. *United States,* 332 U.S. 407, 413, 92 L. ed. 32, 39. See also *Kothe* v. *Taylor Trust,* 280 U.S. 224, 74 L. ed. 382; *Davy* v. *Crawford,* 79 U.S. App. D.C. 375, 376, 147 F. 2d 574, 575; *United States* v. *J. C. Martin Lumber Company,* 246 F. 2d 58, 61-62 (C.A. 5); *National Coop Refinery Assn.* v. *Northern Ordnance,* 238 F. 2d 803, 805 (C.A. 10); *Massman Const. Co.* v. *City Council of Greenville, Miss.,* 147 F. 2d 925 (C.A. 5).

but they do not *arise under* it. See Davis, J., concurring, *Utah Construction and Mining Company* v. *United States*, 168 Ct. Cl. 522, 538, 339 F. 2d 606, 616, aff'd on this point, *United States* v. *Utah Construction*, No. 440, October Term, 1965, decided June 6, 1966. Questions "arising under" the contract within the meaning of the disputes clause are "limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief" to be granted by the contracting agency. See *United States* v. *Utah Construction, supra,* slip op., p. 10 and cases there cited. This "restrictive meaning of the words 'arising under this contract' had long since been established when these parties used them in" their contract in 1961. See *United States* v. *Utah Construction, supra,* slip op., p. 12.

Under that well established restrictive meaning, by no stretch of the imagination can it be claimed that by their contract petitioner and respondent committed to agency determination the question of whether the "liquidated damages" clause of the contract was illegal as imposing an unenforceable penalty.[4]

Moreover, the question as to the invalid and penal nature of the contract's liquidated damages clause is, as conceded by respondent in its brief below (Appellee Br. in Court of Appeals, pp. 1-2, 4-5), a question of

[4] The nature of this question is wholly different from the question that would have been raised had petitioner sought relief from the contracting officer's failure to allow it further extensions of time. This indeed would have been a question arising under the contract for the very reason that there is a specific contract provision authorizing such relief. Article 9, JA 11-12. Petitioner, however, convinced by the contracting officer's findings as to the facts and the extent of the delays, accepted his findings and decision in these respects as correct. But this could not legalize respondent's exaction from petitioner of an unlawful penalty.

law (*Kenny Construction Company* v. *District of Columbia,* 105 U.S. App. D.C. 8, 262 F. 2d 926; *Kayfield Construction Corp.* v. *United States,* 278 F. 2d 217, 218 (C.A. 2); *United States* v. *LeRoy Dyal Co.,* 186 F. 2d 460 (C.A. 3); *Pottsville Casting & Machine Shops* v. *United States,* 121 Ct. Cl. 129, 156, 101 F. Supp. 370, 373; *A. J. Paretta Contracting Co., Inc.* v. *United States,* 109 Ct. Cl. 324, 351-2, cert. den., 333 U.S. 832, 92 L. ed. 1116; *Lundstrom* v. *United States,* 53 F. Supp. 709, 711 (D.C. Ore.), aff'd, 139 F. 2d 792 (C.A. 9); *Hammaker* v. *Schleigh,* 157 Md. 652, 667, 147 A. 790, 796) and therefore one as to which respondent's Contract Appeals Board could not have made a final and conclusive decision. It is therefore clear, both as a matter of law and as an expression of the intent of the parties, that petitioner and respondent did not commit disputes concerning questions of law to administrative determination. This follows from section 2 of the Wunderlich Act, *supra,* p. 2, which antedated the parties' contract by seven years, which specifically prohibits government contract provisions "making final on a question of law the decision of any administrative official, representative, or board,"[5] and

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[5] The legislative history of the Wunderlich Act clearly expresses the congressional intention that this unequivocal language of section 2 of the Act was not to be circumvented by the so-called all-disputes clause, such as was used in the instant contract:

> "Under section 2 of the bill, the committee intends not only to prohibit the insertion in a Government contract of a provision making final a decision of a contracting officer on a question of law, but also bans the indirect insertion of such a provision by incorporation by reference. This will prevent the use of what is commonly known as 'the all disputes clause,' whereby finality of decision was given as to questions of both law and fact."
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> (House Rept. No. 1380, 83rd Cong., 2d Sess., U.S. Code Cong. & Ad. News 1954, 83rd Cong., 2d Sess., pp. 2191, 2195.)

which is applicable to District of Columbia construction contracts.[4] *Kenny Construction Company* v. *District of Columbia* (1959), 105 U.S. App. D.C. 8, 262 F. 2d 926. It follows also from the fact that the jurisdiction of the District of Columbia Contract Appeals Board is limited by its charter to those cases in which the Board's decisions can be final. Reorganization Order No. 29 of the Board of Commissioners of the District of Columbia, Part VII(b), 1 D.C. Code (1961 ed., Supp. V) Administration, Appendix, p. 16; *supra,* pp. 2-3. As Article 15 of the parties' contract committed to the Board only those disputes as to which its decision could "be final and conclusive upon the parties" (Art. 15, *supra,* p. 3; JA 12), the question as to the legality of respondent's withholding $34,750 from petitioner's contract price as "liquidated damages" was not one the contract required petitioner to submit to the Board. Indeed, in view of section 2 of the Wunderlich Act and the limitation found in the Board's own charter, that question could not properly have come before the Board. Cf. *United States* v. *Utah Construction, supra,* Part III.

2. The decision of the court below, holding that petitioner, before bringing this action, was required to go to the Contract Appeals Board with a question not committed to that Board by the contract, is in direct conflict with decisions of the Court of Claims on this subject.

It is well settled that "in the absence of some clear evidence that the appeal procedure [provided in a government contract] is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." *United*

States v. *Holpuch,* 328 U.S. 234, 240, 90 L. ed. 1192, 1196.

It is equally well settled that when the contract does not commit decision to the contracting agency, it is not necessary to appeal from the contracting officer's decision or take other administrative steps prior to bringing suit. See *Railroad Waterproofing Corporation* v. *United States,* 133 Ct. Cl. 911, 916, 137 F. Supp. 713, 715-716, and *Ekco Products Company* v. *United States,* 160 Ct. Cl. 75, 84, 312 F. 2d 768, 773, cited with approval by this Court in *United States* v. *Utah Construction, supra; Norman J. Mulholland* v. *United States,* Ct. Cl. No. 4-63, decided May 13, 1966, slip op., pp. 9-10.

As shown above, the "arising under this contract" and, by reason of section 2 of the Wunderlich Act, the "final and conclusive" limitations in Article 15 of the instant contract withdrew the question in this case from administrative determination. Specifically, those limitations made the Article 15 procedure unavailable to the parties for a determination as to the legal validity and enforceability of the contract's "liquidated damages" provisions. Had petitioner's contract been one with the United States Government itself, rather than with the District of Columbia Government, and had petitioner accordingly brought this action in the Court of Claims, the decisions of that court clearly say that petitioner's failure to exhaust inapplicable and unavailable remedies would not have stood in petitioner's way. The contract being one with the District of Columbia, however, the identical provision of the standard form government construction contract has been construed contrariwise by the only courts open to petitioner, the district

court and the United States Court of Appeals for the District of Columbia Circuit.

The meaning or applicability of the disputes provisions of the standard form government contract should not vary depending upon whether the contract is one with the United States Government proper or with the District of Columbia. Nor should that meaning or applicability depend upon whether the contractor brings suit in the Court of Claims or in the district court; a suit by a contractor, even against the United States, can be brought in the district court as well as in the Court of Claims (28 U.S.C. 1346(a)(2)). Only this Court can resolve this conflict of decision.

Moreover, the decision below is also in conflict with this Court's recent decision in *United States* v. *Utah Construction,* No. 440, October Term, 1965, decided June 6, 1966, Part II, affirming the Court of Claims' interpretation of the scope of the disputes clause in *Utah Construction and Mining Company* v. *United States,* 168 Ct. Cl. 522, 339 F. 2d 606.

The principle has long been enunciated by this Court that exhaustion need not be pursued where "the appeal procedure is inadequate or unavailable." See *United States* v. *Holpuch, supra, ibid; Hillsborough Township* v. *Cromwell,* 326 U.S. 620, 625-26, 90 L. ed. 358, 364; *Greene* v. *United States,* 376 U.S. 149, 11 L. ed. 2d 576; see also 3 Davis, Administrative Law, § 20.07. We have shown that the disputes procedure of Article 15 was unavailable to petitioner because the only question between the parties (Was the "liquidated damages" provision valid?) was a question of law and such questions were not committed by the contract to the Contract Appeals Board. Such un-

availability also rendered any administrative appeal inadequate and futile, because without jurisdiction to decide the question of law, the Contract Appeals Board had no jurisdiction or authority, contractual or otherwise, to remit to petitioner the "liquidated damages" assessed. *Montana Nat. Bank* v. *Yellowstone County*, 276 U.S. 499, 505, 72 L. ed. 673, 676; *Waite* v. *Macy*, 246 U.S. 606, 62 L. ed. 892.

3, The question presented is important in the administration of government contracts. There are outstanding, and entered into annually, myriad standard form government contracts containing disputes provisions identical or closely similar to those in the instant contract. The legal effect of those provisions should be the same in the district courts and the United States Courts of Appeals as it is in the Court of Claims. It should be the same in a District of Columbia contract as in a United States contract. Justice and reasonable governmental contract procedures require no less.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ROBERT E. SHER
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil 337-65

No. 19,769

GREENWOOD AND MAJESTIC CONSTRUCTION CO.,
Appellant,

v.

DISTRICT OF COLUMBIA, *Appellee.*

Filed Mar. 25, 1966

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Burger and Wright, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed on the ground, as was held by the District Court, that plaintiff, appellant in this court, failed to exhaust its administrative remedies.

It is further ORDERED by the court that appellee herein recover from appellant its taxable costs on this appeal, and have execution therefor.

Per Curiam

Dated: Mar. 25, 1966